

IDAHO WIRELESS CORP.

IBLA 90-98

Decided July 23, 1991

Appeal from a decision of the Pocatello Resource Area Manager, Bureau of Land Management, issuing communication site right-of-way I-14557.

Affirmed.

1. Appraisals -- Communication Sites -- Federal Land Policy and Management Act of 1976: Rights-of-Way -- Rent -- Rights-of-Way: Appraisals

The Board will affirm a BLM decision issuing a communication site right-of-way where on appeal the grantee complains that the rental for the right-of-way is too high, but the record shows that the rental was based on an appraisal of the fair market rental value utilizing the comparable lease method of appraisal and the appellant fails to show either that the appraisal method was erroneous or that the appraised value is excessive.

APPEARANCES: Paul E. Anderson, President, Idaho Wireless Corporation, Pocatello, Idaho.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Idaho Wireless Corporation (IWC) has appealed from an October 16, 1989, decision of the Pocatello Resource Area Manager, Bureau of Land Management (BLM), issuing communication site right-of-way I-14557. On August 22, 1989, prior to issuance of the right-of-way, the Area Manager had forwarded the right-of-way grant to IWC for signing and had requested payment of estimated annual rental of \$ 1,500 per year. On October 12, 1989, IWC returned the signed grant to BLM along with a check to cover the estimated rental. On that same date, the Pocatello Resource Area Office received the BLM Appraisal Report, dated September 29, 1989, and approved October 2, 1989, which determined the fair market rental of the subject right-of-way to be \$ 1,500.

On November 15, 1989, IWC filed an appeal of the decision issuing the right-of-way. In the appeal, IWC did not state what its objections were to the decision. However, a memorandum to the file from a BLM employee, dated

November 21, 1989, stated that he was informed via a telephone call from IWC that the appeal was based on IWC's belief that the rental charged by BLM was too high. 1/

BLM issued 10-year communication site right-of-way I-14557 to IWC, pursuant to Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1761-1771 (1988). The site, which covers 0.23 acres, is located on Howard Mountain in the SW 1/4 SW 1/4 (Communications Lot 10), sec. 29, T. 6 S., R. 34 E., Boise Meridian, Bannock County, Idaho, 3.5 miles east of Pocatello, Idaho. 2/ IWC operates FM Radio equipment for its station KZBQ from the site as a principal user. 3/ IWC's equipment is located in a building constructed by KSEI, the primary grantee and holder of right-of-way I-20491. 4/

FLPMA requires the holder of a right-of-way to "pay in advance the fair market value thereof as determined by the Secretary." 43 U.S.C. § 1764(g) (1988). Regulations establish a fee schedule for most linear rights-of-way and provide that the rental for a nonlinear right-of-way grant is to "be based on either a market survey of comparable rentals, or on a value determination for specific parcels or groups of parcels." 43 CFR 2803.1-2(c)(3)(i). This Board has consistently held that the preferred method for determining the fair market value of a nonlinear right-of-way, including communication sites, is the comparable lease method of appraisal. Big Sky Communications, Inc., 110 IBLA 213, 214 (1989); Colorado Interstate Gas Co., 110 IBLA 171, 175-76 (1989); Mountain States Telephone & Telegraph Co., 109 IBLA 142, 145 (1989).

1/ There is no indication in the record that IWC complained about the amount of the rental at the time it returned the signed grant to BLM. At that time, however, the rental was an estimated amount, and the record does not show when IWC was informed of the results of the Appraisal Report.

2/ The right-of-way grant describes the site as being in the "SWSW (Communication Lot 10)" of section 29. The Appraisal Report describes the site as being in the "NW 1/4 SW 1/4 (LOT 10)." Although the right-of-way grant in question is clearly in Communication Lot 10, the most accurate legal description of that lot is the NW 1/4 SW 1/4 SW 1/4 of section 29. The Appraisal Report correctly recognizes that right-of-way I-14557 authorizes IWC to operate FM radio equipment from a building embraced in a prior right-of-way granted to KSEI (I-20491).

3/ Principal user is defined at page 4 of the Appraisal Report as: "Any major user at a site that has or plans to install broadcast stations over 1kw, television stations, microwave equipment, and/or satellite down link stations. Principal users are required to have a right-of-way grant from the Bureau of Land Management."

KZBQ is a broadcast station which is apparently "over 1kw."

4/ The primary grantee of a right-of-way site is the holder of a primary grant. Primary grant is defined in the Appraisal Report at page 4 as: "The first right-of-way granted on a specific communication site. Generally allows construction of building, tower and operation of communication facility."

Under the comparable lease method, the rentals charged for similar sites in the area are reviewed and adjustments are made for variations in the features of the sites and the rights obtained under the leases. Colorado Interstate Gas Co., *supra* at 176; High Country Communications, 105 IBLA 14, 16 (1988). That is the methodology utilized by the BLM appraiser in this case, as reflected in the Appraisal Report.

In that report, BLM compared three leases to the subject right-of-way on the basis of seven factors. <sup>5/</sup> Those factors were the date of issuance, coverage, government regulation, location, access, physical character, and availability of electrical power. The appraiser first compared each of the three sites to IWC's right-of-way with respect to each separate factor, then he conducted an overall comparison to determine whether each lease was superior or inferior to the subject communication site. Finally, the appraiser set forth his rationale for arriving at the annual fair market rental for IWC's site. <sup>6/</sup>

[1] An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal unless an appellant is able to show error in the appraisal method or demonstrate by convincing evidence that charges are excessive. Southern Pacific Transportation Co., 115 IBLA 239, 241 (1990); MCI Telecommunications Corp., 115 IBLA 117, 120 (1990). An appellant is normally required to submit another appraisal in order to present sufficiently convincing evidence that the rental charges are excessive. Oregon Broadcasting Co., 119 IBLA 241, 243 (1991).

In its statement of reasons for appeal, appellant argues that the rental fee imposed by BLM is excessive and based on a faulty and incomplete appraisal. Appellant contends the appraisal failed to recognize that it had development costs at the Howard Mountain site which made its use inferior to comparative leases 1 and 3. Appellant further asserts that the appraisal is faulty because it failed to take into consideration the value of income from subsequent users and did not determine whether the leases used for comparison were superior or inferior to the appraised site in that regard.

IWC contends that the appraisal excluded the most comparable site in terms of site elevation, coverage, and proximity to primary service area, a privately owned communications site used by a local television station which, IWC alleges, leases private land at a much lower cost. The best comparison for appraisals, appellant suggests, would be the closest privately owned communications site used for broadcast, in this case, the television station. Appellant states that this station has a long term

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<sup>5/</sup> At page 15 of the Appraisal Report, the BLM appraiser initially concluded that "[c]onsidering the large area the subject can cover and the competition for sites on Howard Mountain, it is my opinion, the highest and best use of the subject site is for communication purposes."

<sup>6/</sup> The three comparable leases utilized by BLM had rentals of \$ 1,200 (Lease 1), \$ 2,400 (Lease 2), and \$ 3,300 (Lease 3). All three leases were for FM radio equipment.

lease at \$ 1,000 per year, in addition to the right to rent tower and building space to subsequent users without any change in their land lease cost which, appellant asserts, makes it vastly superior to its lease. Appellant contends that because of the advantages enjoyed by television, as compared to radio, it is inappropriate to compare the two without reducing the value for radio transmission projects. Finally appellant argues its rental should be reduced to \$ 250 per year or some other mutually agreed upon amount.

Appellant has not shown that there was error in the appraisal method used by BLM or that the appraised rental charge is excessive. The three sites used by BLM as comparables are all FM radio transmission or support facilities. Although appellant asserts that a private land lease for television station KPVI-TV represents a more comparable lease and that the rent for such lease is \$ 1000 per year, it has presented no documentary evidence in support of that claim. Appellant has failed to establish that BLM erred in not including the KPVI-TV lease as a comparable. In addition, while appellant alleges that it had certain unspecified development costs for its site, and that such expenses made its site inferior to comparable leases 1 and 3, the overall comparison shows that the site in question was rated inferior to comparable lease 3 and superior to comparable lease 1. Thus, recognition of any development costs by IWC would not affect the overall comparison with comparable lease 3. Nor do we believe that any such expenses would influence the overall rating for comparable lease 1 because the subject site is rated superior for coverage, a ranking not disputed by IWC, and, as stated in the Appraisal Report at page 17, "[t]he primary factor which determines value of a site is the ability of the site to provide coverage in terms of land area and people, or distance between microwave sites."

Although appellant suggests that a proper rental should be \$ 250 per year for its lease, it has provided no support for such a claim and there is no indication in the record that it utilized another appraisal in arriving at that amount.

Appellant contends the appraisal was faulty in not giving proper consideration to the value of income from subsequent users, a benefit that its grant does not provide. It is clear that the appraiser recognized that factor in his analysis. He stated:

The data presented indicates a range of values between \$ 1,200 and \$ 3,300 per year. Lease 2 at \$ 2,400 is considered more closely comparable to the subject, however, the subject is inferior due to the advantage the lease has in coverage, government regulation and access. The subject is a subsequent grant to R/W I-20491, which was appraised April 26, 1989. The rent for the primary grant is \$ 1,750 per year. 7/ The subject has coverage over the

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7/ The determination of the fair market rental value for this right-of-way issued to KSEI is the subject of an appeal before this Board docketed as IBLA 89-467.

same area as the primary grant, but does not have the same rights. The primary grantee owns the building and charges the applicant rent, and can recover part of his investment. The applicant, in effect, has two landlords as he has to pay rent to the government as well as to the primary grantee.

(Appraisal Report at 23). Thus, it appears that BLM has, in fact, distinguished the value of the rights conveyed by appellant's right-of-way from the value of the right-of-way issued to the primary grantee, which included the right to construct a building and transmission tower. We conclude that BLM properly appraised the subject right-of-way and correctly established the fair market rental value at \$ 1,500 per year.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Bruce R. Harris  
Administrative Judge

I concur:

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C. Randall Grant, Jr.  
Administrative Judge